

CITATION: Canadian Constitution Foundation v Attorney General of
Canada, 2021 ONSC 4744
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ONTARIO SUPERIOR COURT OF JUSTICE

RE: CANADIAN CONSTITUTION FOUNDATION, *et al.*, Applicants
-and-

ATTORNEY GENERAL OF CANADA, Respondent

BEFORE: FL Myers J

COUNSEL: *Jonathan Roth*, for the Applicants
James Todd and Mahan Keramati, for the Respondent

HEARD: June 28, 2021

ENDORSEMENT

This Application

- [1] The applicants¹ challenge the constitutionality of Order in Council PC No. 2021-0075, dated February 14, 2021, entitled *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)* as continued under Orders in Council, Nos. 2021-0174 made on March 19, 2021, 2021-0313 made on April 21, 2021, and 2021-0421 made on May 21, 2021.

¹ As each of the individual applicants has standing to challenge these laws, I do not need to deal with the standing of the Canadian Constitution Foundation. Although it has been found to have standing in prior cases, I question whether on its evidence and in the circumstances of this case, it would have met the tests for private or public interest standing. I am therefore not to be taken to have accepted its standing in this proceeding.

- [2] Simply put, the applicants ask the court to stop the government from requiring people who enter Canada by airplane to quarantine at their own expense in a hotel for up to three days while waiting for the results of a COVID-19 test.
- [3] The applicants do not challenge the 14-day home quarantine requirement imposed on all travellers entering Canada. They limit their challenge to the mandatory hotel quarantine for air travellers piece of the government's measures.
- [4] The applicants allege that the hotel quarantine rules violate their rights under the *Charter of Rights and Freedoms*.
- [5] For the reasons discussed below, I find that none of the applicants has established a breach of his or her rights. Accordingly, the application is dismissed.

The Facts

- [6] I set out the salient facts in my interlocutory decision in March reported as *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 2117. Since then, some applicants have bolstered their financial evidence to try to establish that they could not afford to pay for the government's quarantine hotel requirement. In addition, they filed evidence of two non-parties concerning hardships they suffered while quarantined.

***Spencer v. Canada (Health)*, 2021 FC 621 (CanLII)**

- [7] By decision dated June 18, 2021, Chief Justice PS Crampton of the Federal Court dismissed a different claim challenging the hotel quarantine rules. The decision is 137 pages and deals extensively with all of the same rights as are implicated by the applicants.
- [8] The Chief Justice's decision is thorough and compelling. I agree with it and adopt it. I therefore limit my discussion below to the efforts made by the applicants to distinguish the *Spencer* decision. The applicants point to new or different facts to try to argue that a different outcome should be reached today in face of the evolution of the science and policy development.

The Initial Development of the Hotel Quarantine Rules

- [9] The applicants submit that in establishing the hotel quarantine rules, the government did not follow the initial advice provided to it based on reviews of experiences in other jurisdictions. In particular, the recommendations from a review of foreign countries' efforts with hotel quarantine was that the quarantine period should be a minimum of seven days and the government should provide transportation from airports to hotels to minimize community contacts between travellers and others.
- [10] The applicants also note that a test on arrival at a Canadian airport is very unlikely to disclose COVID-19 cases caught by travellers at the foreign airport or on the airplane.
- [11] Therefore, they argued that the program was flawed in its initial design.
- [12] The government's program includes a second test for quarantined travellers on day eight that is designed to catch infections missed by the test administered on arrival.
- [13] Rather than providing transport to hotels, the government has required its approved hotels to do so and has issued draft best practices to guide them. They are not perfect and can be circumvented by hotels who do not take appropriate care.
- [14] Regulations can be broken too. The government is relying on the hotels' desires to protect their accreditation to incentivize compliance. As there is no perfect enforcement of regulatory breaches either, there is no constitutional significance to the government's policy choice to regulate hotels by best practices rather than by regulation. There is no evidence that the current transport process fails or has a different outcome than would a system of government run transports. 4
- [15] The government is making policy choices designed to limit the importation of the disease and especially the variants of concern that are now gaining prominence. Perfection is neither the goal nor the test for constitutionality.

- [16] The government's goal is harm reduction rather than elimination. It has decided from a policy basis that Canada cannot shut down tight for two weeks to eliminate the disease. We need food and vital goods from the US. Even if we could shut down therefore, any re-opening for necessities would expose us once again.
- [17] I disagree with the submission that there is no public benefit from the use of the hotel quarantine process. It catches 64% of incoming air travellers who are bringing COVID-19 into the country and requires them to interact with Health Canada officials who see to the adequacy of the remainder of their quarantine. If necessary, the Health Canada officials can order the travellers into mandatory, government-funded quarantine for the rest of the 14-day quarantine period.

The Hotels are not Risk-free

- [18] The applicants submit that the hotels are risky because there have been COVID-19 outbreaks there too. The City of Toronto has provided guidance that hotels, like any workplace, have risk and should be avoided if possible. But, to date, there is no evidence of any traveller catching COVID-19 during mandatory quarantine at a government accredited hotel. Outbreaks have been among staff who are kept socially distant from travellers to the extent possible at the hotels. Hotels with staff outbreaks have been closed temporarily. Studies are still underway.
- [19] The applicants submit that the government hotel quarantine regime is therefore as or more risky than home quarantine. The evidence does not support that submission. Despite best efforts, home quarantine is not perfect either. There have been tragic cases of death through community transmission of the disease as a result of well-intentioned home quarantine.
- [20] There is no evidence of comparative risk between home and hotel quarantine. Even if there were, the applicants have to show that the government's choices are arbitrary or not rationally related to its goal of harm reduction. The existence of a risk or some comparative difference between two risks does not make a policy choice arbitrary or irrational. Absent evidence and then an understanding of the government's choices made in light of such evidence, merely stating that hotels are not risk-free is of no consequence.

The Expert Panel Report

- [21] The applicants put their greatest emphasis on the report of the Minister of Health's COVID-19 Testing and Screening Expert Advisory Panel entitled *Priority Strategies to Optimize Testing and Quarantine at Canada's Borders*.
- [22] Although the panel's last meeting was apparently in April, the report was transmitted to the Minister on May 25, 2021.
- [23] The applicants argue that the government's own expert panel has recommended against the continuation of mandatory hotel quarantine. They say that the government knew or should have known that the expert panel was going to recommend against continued mandatory hotel quarantine in March or April and should have acted by now to end hotel quarantine.
- [24] Despite the emotive headline, counsel studiously avoided the actual wording of the expert panel report however. It does not say what counsel says it says.
- [25] While the expert panel certainly relied upon available science, its task was not a scientific one *pers se*. It was charged with making policy recommendations. It adopted the following "Guiding Principles":
- Public health initiatives should minimize unintended harm, promote equity and increase transparency and accountability. Panel discussions and engagement with stakeholders highlighted a number of key principles to consider in its guidance, including equity, feasibility and acceptability. The Panel applied these principles in framing its guidance.
- This report contains the Panel's independent advice and recommendations, which were based on available information at the time of writing the report. The Panel examined scientific journal articles, modeling studies, news articles and data from the Public Health Agency of Canada to inform its recommendations.
- [26] The expert panel did not provide scientific truth to the government. Nor are its recommendations of constitutional force. They are important input for the government in making policy choices to formulate laws.

- [27] The expert panel’s recommendations are evidence that can inform a constitutional inquiry. But the analysis does not stop with the headline that “the expert panel recommended against continued use of quarantine hotels”. The question is whether the government’s policy choices as enacted into laws violate the *Charter* and not whether the government failed to adopt the policy recommendations of its expert advisory panel.
- [28] In any event, the applicants have not shown that the government has failed to adopt the recommendations of its expert advisory panel.
- [29] The expert panel discussed travel to and from Canada and the use of border controls and testing as important COVID-19 prevention measures. The panel consider alternative processes such as a mandatory seven-day quarantine pending a second test result:

Quarantine exit testing becomes more important when compliance with quarantine is low. Depending on the level of compliance, a 7-day quarantine with testing may be more effective than a 14-day quarantine without testing. While a mandatory three-day initial quarantine in government-authorized accommodations obviously improves compliance during those 3 days, the level of compliance after is uncertain. Requiring a test at day 7 of quarantine to facilitate exit may prove to be an incentive and thus increase compliance, resulting in more robust surveillance. [Notes omitted.]

- [30] The expert panel discussed foreign experience, efforts to improve enforcement of quarantine by enhancing social acceptance, incidence of COVID-19 positive cases in people who are exempted from quarantine requirements, the issue of onward travel once in Canada, and vaccines.
- [31] The expert panel made many recommendations under three headings. I reproduce the headings and the associated recommendations:

I. Border measures must evolve to reflect the experience gained and the global situation regarding [Variants of Concern] and vaccination:

The Panel recommends that the Government of Canada continue screening positive cases in international travellers for [Variants of Concern].

The Panel recommends that the Government of Canada have procedures in place to ensure that all travellers submit required tests and that all positive results are immediately communicated to the appropriate local public health authority.

II. Border measures must be simple, easy to understand, equitable and consider both benefits and harms:

The Panel recommends that land and air border measures should be consistent as much as possible.

The Panel recommends that the requirement for all air travellers to quarantine in government-authorized accommodations be discontinued. However, travellers subject to quarantine must provide a suitable quarantine plan for approval and adhere to this plan. The Panel recommends that the government continue to ensure that those who do not have a suitable quarantine plan be required to adhere to an alternative one (for example, in designated quarantine facilities). The country is in the third wave of COVID-19. This must be taken into consideration when phasing out current border measures such as government-authorized accommodations.

...the Panel does not recommend implementation of country-specific testing or quarantine requirements at this time, except under unique circumstances. Increased monitoring of quarantine compliance should be considered for travellers arriving from countries with new variants of concern.

Rapid antigen tests were considered for onward travellers arriving by air as a means of quickly determining if they were potentially positive. However, the Panel does not currently see substantial incremental value in testing onward travellers at airports considering the other testing points throughout the traveller's journey. If onward travellers are transiting to an international flight, no arrival testing is required in Canada. If they are transiting to a domestic flight or other transport, a PCR test is required on arrival.

III. Changes to border measures should be implemented in a phased approach:

The Panel recommends phased implementation of new border measures and consideration for the implementation process, including enforcement, which for some new measures, may take more time to implement.

The Panel recommends the Government of Canada continue to use the ArriveCAN app to manage traveller information reporting. The Panel also recommend that quarantine plans be reviewed and approved for travellers arriving at both land and air borders, including symptom screening for all travellers. The Panel also acknowledges that there will be a number of considerations regarding vaccine "certification." A system to validate proof of vaccination for arriving travellers should be made available as soon as possible.

The Panel recommends that all travellers follow requirements from public health authorities (including physical distancing, mask wearing).

- [32] The expert panel discussed several implementation issues such as: surveillance testing information improvements, border logistics, quarantine and testing capacity, digital technology, and new testing tools. On the latter point it wrote:

As new testing tools become available, Canada should explore how they can be used to improve border measures. For example, rapid tests that also screen for [variants of concern] could increase the speed of testing as well as the speed for managing cases and contact tracing. Similarly, emerging evidence on the effectiveness of unsupervised home sampling could help relieve current logistical constraints. If adopted, further consideration is required to ensure appropriate reporting to relevant public health authorities. As well, implementation of new testing tools will require guidance to assist border agents will require support whenever new testing tools are implemented.

- [33] Under cross-examination, the government's lead expert witness agreed that he is aware of an approved device for PCR rapid testing. He was not aware of whether they had yet been proven effective for actual use in the field. There was no evidence led by either side of there being a readily available supply of cost-effective rapid PCR testing devices that have been proven to be accurate in generalized usage. However, as noted by the expert panel, the government is aware of the desirability of continuing to follow-up on this possibility. Once fully available, a rapid PCR test would hopefully eliminate the need for hotel quarantine. However, that conclusion will have to await the evidence that may be available at that time.
- [34] It is not a fair recitation of the expert panel's report to simply state that it recommended against the continuation of mandatory hotel quarantine. It made a suite of inter-related recommendations for the government's consideration including the need for a phased approach recognizing the existence of the third wave, the spread of variants of concern, the development of new tools, and the implementation of vaccines.
- [35] There is no support for the applicants' submission that the expert panel concluded that transiting travellers were no longer a concern. One of the differentiations of international air travellers from motor vehicle travellers is that air travellers arrive at one of four hub airports but then take domestic flights to disperse throughout the country. The panel said that since all international air travellers are given an accurate PCR test on arrival in Canada, it saw no use in continuing to give transiting travellers a less reliable antigen-based rapid test too.
- [36] That is a long way from the applicants' submissions that the expert panel found that people about to board domestic flights to spread throughout the country present no different risk profile than people driving into Canada who will continue on directly to their quarantine locations in their own cars and trucks. That is not a fair presentation of the facts.
- [37] The applicants submit that the government has failed to follow the advice of its expert advisory panel. The applicants do not ask for the quarantine to be extended to seven days as would be *more* effective according to the expert panel. Rather, they want the quarantine eliminated sooner than the government is prepared to do so. They assert,

without evidence, that the government should have known and acted on the expert panel's recommendations a month or two before the report was even transmitted to the Minister. They assert, without evidence, that there are rapid PCR tests available for widespread use that make hotel quarantine unnecessary.

- [38] The thrust of the expert panel report, captured in the three headings of its recommendations, is that border measures should evolve, be simple and equitable, and be phased-in. It did not say that the current process does not work or is arbitrary or should be stopped immediately. It made numerous recommendations for the current processes to evolve including that the hotel quarantine process be ended as new processes are developed and can be phased-in at an appropriate time.
- [39] I find as a fact that the applicants have not established that the government has failed to follow the advice of its expert advisory panel fairly read. Said in the positive, the government is following the advice of its expert advisory panel.
- [40] The expert panel report was before Chief Justice Crampton. He noted that it was only available to him for use in considering s. 1 of the *Charter*. Here, the applicants try to use the report as evidence to establish that the government's measures are irrational or arbitrary.

Analysis

- [41] It is gross hyperbole for the applicants to submit that the expert panel report and the City of Toronto's advice concerning workplaces establish that there is *no connection* between waiting for a PCR test result at a hotel and the prevention of the transmission of COVID-19. That is just not the case.
- [42] The government has imposed a suite of border control testing and quarantine measures that are frequently tailored with the evolution of science and available information. The hotel stay to catch 64% of COVID-19 cases imported by air and to see to those travellers' quarantine is one part of the suite. It is not arbitrary. It is not irrational. It is not significantly overbroad.

- [43] The government's program is not perfect. Its measures are designed to help prevent transmission of COVID-19 and, especially, the importation of variants of concern into the country while rapid tests are being developed and while we are still getting vaccinated. It is a choice among a range of possible and rational choices. There are more stringent and less stringent alternatives available.
- [44] As information develops, the measures are amended. As of this week, for example, fully vaccinated people are now exempted from hotel quarantine (as recommended by the expert panel).
- [45] The government's measures cause some personal inconvenience. I do not accept the submission however, that the applicants' financial evidence establishes that people are preventing from leaving or entering Canada by the cost of the hotels. The government provides a free alternative. I suspect that government quarantine centres are probably not as comfortable as hotels. But with a free alternative available to all, the cost of the hotels is factually not an impediment to entering or leaving Canada.
- [46] Similarly, while a witness had difficulty obtaining food that he felt was appropriate for his diabetes and two new parents bringing a foreign-adopted baby into the country had to stay at a hotel instead of their home on the baby's first night in Canada, neither of these amounts to cruel or unusual treatment. I do not question the discomfort suffered by these witnesses. But the witnesses' transitory discomfort do not raise concerns of cruel and unusual treatment that are not fully addressed by Chief Justice Crampton in *Spencer*.
- [47] As I find no breach of the *Charter* on the facts before me, I do not reach s. 1 of the *Charter*. However, I agree and adopt Chief Justice Crampton's s. 1 analysis if that were necessary.

Outcome

- [48] The application is dismissed.
- [49] The respondent may deliver cost submissions no later than July 12, 2021. The applicants may deliver cost submissions no later than July 19, 2021. In addition, the parties may deliver copies of any offers to settle on

which they rely. Submissions shall be no longer than three pages. Both parties shall deliver Costs Outlines if they deliver submissions.

- [50] All costs material is to be filed through the Civil Submissions Online portal and uploaded to Caselines although counsel will not have received confirmation of the acceptance of their filings from the registrar.
- [51] No case law or statutory material is to be submitted. References to case law and statutory material, if any, shall be embedded in the parties' submissions as hyperlinks to CanLII.

FL Myers J

Date: July 5, 2021